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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Bell Operating Company ) CC Docket No. 96-21  
Provision of Out-of-Region )  
Interstate, Interexchange Services )

**ORDER ON RECONSIDERATION**

Adopted: October 13, 1998

Released: October 20, 1998

By the Commission:

**I. INTRODUCTION**

1. In this order, we find that, where a Bell Operating Company (BOC) provides out-of-region international facilities-based service and generates international "return" traffic in exchange, the BOC may terminate such return traffic within its region, prior to obtaining in-region authority, subject to the Commission's rules and policies governing international telecommunications services. We therefore deny the petition for reconsideration filed by MCI Telecommunications Corporation (MCI) in the above-captioned proceeding.

**II. BACKGROUND**

2. In enacting the Telecommunications Act of 1996 (1996 Act),<sup>1</sup> Congress sought to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>2</sup> The 1996 Act amended the Communications Act of 1934 (Act) to provide, among other things, that the BOCs could provide interLATA telecommunications services

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934, as amended. Hereinafter, all statutory citations are as codified in the U.S. code.

<sup>2</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996).

originating outside of their in-region states.<sup>3</sup> In doing so, however, Congress determined that certain calls that originate out-of-region are nonetheless deemed to be in-region interLATA traffic for purposes of section 271 of the Act, and thus a BOC is not permitted to provide such service until it obtains in-region authority consistent with the requirements of that section.<sup>4</sup>

3. On July 1, 1996, the Commission released an interim order to facilitate BOC entry into the out-of-region, domestic, interstate, interexchange services market.<sup>5</sup> As part of the *BOC Interim Out-of-Region Order*, the Commission concluded that calling card, collect, and third party billed calls that originate out-of-region and terminate in-region are not "equivalent" services under section 271(j) because it is the calling party, not the called party, that determines the interLATA carrier.<sup>6</sup>

4. MCI filed a petition for reconsideration and/or clarification of the *BOC Interim Out-of-Region Order* requesting that we treat a BOC's termination of international return traffic within its region as in-region traffic under section 271(j).<sup>7</sup> MCI notes that, as part of

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<sup>3</sup> 47 U.S.C. § 271(b)(2). Prior to enactment of the 1996 Act, the BOCs were prohibited from providing interLATA services by the terms of the Modification of Final Judgment (MFJ). See *United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). For purposes of this proceeding, we define the terms "BOC," "in-region state," "interLATA service," and "LATA" as those terms are defined in 47 U.S.C. §§ 153(4), 271(i)(1), 153(21) and 153(25), respectively, of the Act. The Act generally defines the term "LATA" (or local access and transport area) as a "contiguous geographic area . . . established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company . . . or established or modified by a Bell operating company after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). The Act defines an "in-region" state as one in which a BOC or any of its affiliates were authorized to provide wireline telephone exchange service pursuant to the AT&T Consent Decree. See *id.* § 271(i)(1).

<sup>4</sup> 47 U.S.C. § 271(j); see also *id.* § 271(b)(1) (providing that a BOC or BOC affiliate "may provide interLATA service originating in any of its in-region States . . . if the Commission approves the application . . . under subsection (d)(3)"). See *infra* ¶ 7.

<sup>5</sup> *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, Report and Order, 11 FCC Rcd 18,564 (1996) (*BOC Interim Out-of-Region Order*). The Commission subsequently adopted an order that determined, among other things, the appropriate regulatory treatment of BOC and BOC affiliate provision of both in-region and out-of-region interLATA services. See *Regulatory Treatment of LEC Provision on Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15,756 (1997) (*LEC Regulatory Classification Order*).

<sup>6</sup> See *BOC Interim Out-of-Region Order*, 11 FCC Rcd at 18,586 (¶ 47).

<sup>7</sup> See Petition for Reconsideration and/or Clarification of MCI Telecommunications Corporation, CC Docket No. 96-21 (filed Aug. 8, 1996) (MCI Petition).

the Commission's International Settlements Policy (ISP), each U.S. facilities-based carrier receives the same share of inbound international message telephone service (IMTS) traffic that it sends outbound to a particular foreign carrier.<sup>8</sup> As a result, to the extent a BOC provides out-of-region facilities-based switched service subject to the ISP, it receives a proportionate amount of return traffic to terminate in the United States. Such return traffic could include traffic destined for that BOC's in-region states. Bell Atlantic, NYNEX, and Pacific Telesis filed oppositions to MCI's petition.

5. In addition to its petition filed in this proceeding, MCI raised these same concerns in other proceedings as well. MCI filed petitions to deny several applications filed by BOCs under section 214 for authority to provide out-of-region international facilities-based services.<sup>9</sup> The International Bureau denied MCI's petitions and granted the BOCs' applications on delegated authority. MCI also raised related concerns in the *LEC Regulatory Classification* proceeding,<sup>10</sup> which the Commission addressed in that proceeding.<sup>11</sup>

### III. DISCUSSION

6. In its petition, MCI asserts that, where a BOC provides out-of-region international facilities-based service and generates international return traffic that terminates within its region, it "exercises the type of control over the choice of carrier for such return traffic -- namely itself -- that a caller usually does domestically."<sup>12</sup> As a result, MCI claims, the same competitive issues associated with a BOC's provision of in-region traffic arise. MCI requests that return traffic terminating within a BOC's region be considered beyond the BOC's authority until it obtains in-region authority, and that during the interim, any such traffic should be handed off to another international carrier for termination.<sup>13</sup>

7. As an initial matter, MCI does not argue, nor do we find, that a BOC's interLATA carriage of international return traffic terminating within its region falls within any

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<sup>8</sup> See *MCI Petition at 2*; see also *Regulation of International Accounting Rates, Phase II, Fourth Report and Order*, 11 FCC Rcd 20,063 at 20,070 (¶ 19) & 20,090 (¶¶ 66-67) (1996) *recon. pending (Flexibility Order)*.

<sup>9</sup> MCI Petition to Deny Bell Atlantic Communications, Inc. Application for Facilities-based International Services, ITC-96-451 (filed Sept. 13, 1996); MCI Petition to Deny NYNEX Long Distance Company Application for Facilities-based International Services, ITC-96-520 (filed Oct. 18, 1996); MCI Petition to Deny Pacific Bell Communications Application for Facilities-based International Services, ITC-96-692 (filed Jan. 24, 1997).

<sup>10</sup> See MCI Comments, CC Docket No. 96-149, at 68 (filed Aug. 15, 1996).

<sup>11</sup> See *LEC Regulatory Classification Order*, 12 FCC Rcd at 15,839-40 (¶¶ 140-41).

<sup>12</sup> MCI Petition at 4.

<sup>13</sup> *Id.* at 5.

logical reading of the Act's prohibition against BOC provision of "interLATA services originating . . . in-region."<sup>14</sup> The Act specifies, however, that certain types of interLATA traffic that originate outside a BOC's region nonetheless will be considered in-region services for purposes of section 271. Specifically, section 271(j) provides that "800 service, private line service, or their equivalents that -- (1) terminate in an in-region State of that [BOC], and (2) allow the called party to determine the interLATA carrier, shall be considered an in-region service."<sup>15</sup> Section 271(j) is clear in its requirement that, to be considered an "equivalent" service under that provision, the service must not only terminate "in-region," but the *called* party must also determine the interLATA carrier.<sup>16</sup> Indeed, in the *BOC Interim Out-of-Region Order*, the Commission concluded that "the key factor in determining whether a service falls within the scope of section 271(j) as 'equivalent' to 800 or private line service is whether the *called* party determines the interLATA carrier that is used."<sup>17</sup> In that order, the Commission found that calling card, collect, and third party billed calls that originate out-of-region and terminate in-region do not fall within the scope of section 271(j) because it is the calling party, not the called party, that determines the interLATA carrier.<sup>18</sup>

8. MCI asserts that the Commission should "look beyond the literal meaning" of section 271(j). MCI acknowledges that, with regard to foreign-originated international traffic, neither the calling party nor the called party chooses the interLATA carrier that terminates the call on the U.S. end. MCI maintains, nonetheless, that the Commission should prohibit a BOC from carrying international return traffic that terminates within its region prior to obtaining in-region authority.<sup>19</sup> MCI raises two policy arguments in support of its position. First, MCI claims that because a BOC's outbound traffic generates the return traffic at issue, and because the foreign calling party exercises no control over the choice of the U.S. interLATA carrier, a BOC's termination of such traffic within its region allows the BOC to exercise the type of control over such traffic that it does over traffic originating in-region, "thus raising similar competitive and ratepayer concerns."<sup>20</sup> MCI argues that the competitive goals expressed in section 271(j) are even greater in the return traffic context because a BOC

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<sup>14</sup> 47 U.S.C. § 271(b)(1).

<sup>15</sup> *Id.* § 271(j).

<sup>16</sup> *See id.*

<sup>17</sup> *BOC Interim Out-of-Region Order*, 11 FCC Rcd at 18,586 (¶ 47) (emphasis in original).

<sup>18</sup> *See id.*

<sup>19</sup> MCI Reply at 5. We note here that MCI filed its reply one day late, on October 4, 1996, together with a Motion for Leave to File Out of Time. Because no parties were prejudiced here, we grant MCI's motion.

<sup>20</sup> MCI Petition at 5.

generates the traffic for itself.<sup>21</sup>

9. Second, MCI asserts that in enacting section 271(j), Congress did not contemplate a circumstance, such as the return traffic scenario, in which neither the calling party nor the called party chooses the interLATA carrier.<sup>22</sup> As a result, MCI claims, the language of section 271(j) should not preclude the Commission from prohibiting BOC termination of return traffic in-region. In support of its assertion, MCI relies on the Commission's conclusion in the *BOC Interim Out-of-Region Order* that calling card, collect, and third-party billed calls are not in-region "equivalents" under section 271(j) because with each service "it is the *calling* party, not the called party that determines the interLATA carrier."<sup>23</sup> In the case of return traffic, MCI notes, neither the calling party nor the called party determines the interLATA carrier. MCI claims that, because Congress did not contemplate this circumstance, the Commission should exercise its general authority under section 4(i) of the Communications Act of 1934, as amended, to address the competitive and rate concerns that arise from BOC termination of return traffic in-region.

10. We are not persuaded that a BOC's interLATA carriage of international return traffic that terminates within its region should be deemed originating in-region traffic under section 271(j). Rather, we agree with earlier findings made by the International Bureau,<sup>24</sup> as well as the comments filed by several BOCs in this proceeding,<sup>25</sup> that the plain language of section 271(j) does not support a finding that international return traffic should be deemed in-region service for purposes of section 271. International return traffic is controlled by the carrier of the originating customer, which assigns it to U.S. facilities-based international carriers pursuant to the Commission's proportionate return policy for allocating return traffic among U.S. carriers. The *called* party does not determine the U.S. interLATA carrier.<sup>26</sup> The Commission's statement in the *BOC Interim Out-of-Region Order* that the services in question require the calling party to choose the interLATA carrier was intended to demonstrate that in those circumstances the called party does not exercise carrier choice and thus those services

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<sup>21</sup> MCI Reply at 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *BOC Interim Out-of-Region Order*, 11 FCC Rcd at 18,586 (¶ 47) (quoted in MCI Reply at 7).

<sup>24</sup> See *Bell Atlantic Communications, Inc., NYNEX Long Distance Company*, 12 FCC Rcd 1880 at 1890-94 (¶¶ 23-28) (Int'l Bur. 1997); *Pacific Bell Communications*, 12 FCC Rcd 13,723 at 13,724-27 (¶¶ 4-11) (Int'l Bur., Tel. Div. 1997).

<sup>25</sup> NYNEX Opposition at 1 ("[B]y the plain language of section 271(j) and the Commission's Order in this proceeding, such return traffic is unquestionably excluded from the definition of in-region services."); Bell Atlantic Opposition at 2 ("Nothing in section 271(j) covers international return traffic."); Pacific Telesis Opposition at 2 ("MCI's suggested categorization . . . simply does not fit with the statutory scheme.").

<sup>26</sup> See *Flexibility Order*, 11 FCC Rcd at 20,090 (¶ 66).

fall outside section 271(j). The statement does not indicate any wavering from the plain language of the provision, which requires that the called party choose the interLATA carrier. That same reading of the statute applies here. International return traffic does not involve the called party's selection of the interLATA carrier and thus does not constitute an in-region service under the plain language of section 271(j). As discussed above, moreover, it does not fall within any logical reading of the section 271(b) prohibition against BOC provision of interLATA services originating in-region.<sup>27</sup> In addition, we find below that it is not necessary to exercise our authority under section 4(i) to address the competitive concerns that MCI asserts could arise from a BOC's return traffic arrangements.

11. The only specific competitive issue raised by MCI is the concern that a BOC could negotiate a "grooming" arrangement with foreign carriers under which the BOC would only receive return traffic that terminates within its region. MCI claims that the BOC would thus keep the entire accounting rate and not have to pay out terminating access charges to another local carrier. This strategy, it asserts, would only be feasible because of the BOC's large monopoly customer base.<sup>28</sup> MCI asks that, if we decline to grant its requested relief, the Commission nonetheless should prohibit the BOCs from entering into such grooming arrangements and impose special traffic reporting requirements on the BOCs' provision of out-of-region international facilities-based services.<sup>29</sup>

12. The Commission first addressed the grooming of international return traffic in response to an MCI filing in the *LEC Regulatory Classification* proceeding. In that proceeding, the Commission concluded that, based on the record, it was not prepared to rule that the grooming of return traffic in a manner that may ultimately reduce U.S. carrier costs and rates is anticompetitive *per se*.<sup>30</sup> As a general matter, a grooming arrangement would constitute a special concession prohibited by section 63.14 of the Commission's rules, to the extent the U.S. carrier entered into such an arrangement with a foreign carrier with market power which did not make the same offer to similarly situated U.S. carriers.<sup>31</sup> The grooming described by MCI, moreover, would be subject to the Commission's ISP, and thus a BOC or

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<sup>27</sup> See *supra* ¶ 7.

<sup>28</sup> See MCI Reply at 4-5.

<sup>29</sup> See *id.* at 9.

<sup>30</sup> See *LEC Regulatory Classification Order*, 12 FCC Rcd at 15,839-40 (¶ 141).

<sup>31</sup> As part of the *Foreign Participation Order*, the Commission narrowed the No Special Concessions Rule to prohibit U.S. carriers from agreeing to accept special concessions granted by foreign carriers that possess sufficient market power on the foreign end of a particular international route to affect competition adversely in the U.S. market. See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, 23,958 (1997) *recon. pending* (codified at 47 C.F.R. § 63.14(a)).

any U.S. carrier would be required to submit the arrangement to the Commission for public comment and review where its terms deviate from existing arrangements with other U.S. carriers for the routing and/or settlement of traffic on that route.<sup>32</sup>

13. We note here that in a recent notice of proposed rulemaking, the Commission proposed to remove the ISP and filing requirements with respect to arrangements with foreign carriers in certain circumstances.<sup>33</sup> The Commission recognized that, if adopted, this proposal would eliminate the pre-approval or public filing of grooming arrangements in these cases. In the notice, the Commission sought comment on whether grooming arrangements present a potential for anticompetitive effects. "particularly with respect to arrangements between foreign carriers with market power and incumbent local exchange carriers."<sup>34</sup> The Commission also asked whether the potential for anticompetitive effects would justify retaining some safeguards on grooming arrangements. We believe that the notice of proposed rulemaking is the appropriate forum to examine these issues. We therefore decline to adopt in this proceeding a generalized prohibition on BOCs entering into grooming arrangements. Furthermore, MCI offers no justification to support its claim that we should impose special traffic reporting requirements on the BOC's provision of out-of-region facilities-based international service.

#### IV. CONCLUSION

14. We find that a BOC's carriage of international return traffic that is generated by its provision of out-of-region international facilities-based service and that terminates within its region is not originating in-region traffic under section 271. We therefore deny MCI's petition. We reiterate, however, that a BOC or any other international carrier seeking to enter into a grooming arrangement for traffic subject to the ISP must submit the arrangement for public review and comment and obtain prior approval from the Commission.

#### V. ORDERING CLAUSES

15. Accordingly, IT IS HEREBY ORDERED that the October 4, 1996 Motion of

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<sup>32</sup> We note that, as part of the *Foreign Participation* reconsideration proceeding pending before us, SBC has requested that the Commission reexamine the International Bureau's practice of conditioning a BOC's authority to provide international services under section 214 to require that any arrangements to terminate switched traffic within its region via its international private line facilities are subject to the ISP filing requirements referenced in section 43.51(e) of our rules. See SBC Petition for Reconsideration, IB Docket No. 97-142 at 6-7 (filed Jan. 8, 1998) (citing *Bell Atlantic Communications, Inc.*, 12 FCC Rcd at 1894 (¶ 28)).

<sup>33</sup> See 1998 Biennial Regulatory Review -- *Reform of the International Settlements Policy and Associated Filing Requirements, Regulation of International Accounting Rates*, IB Docket No. 98-148, CC Docket No. 90-337, Notice of Proposed Rulemaking (rel. Aug. 6, 1998).

<sup>34</sup> *Id.* ¶ 43.

MCI For Leave To File Out of Time IS GRANTED.

16. IT IS FURTHER ORDERED that, pursuant to section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i), MCI's petition for reconsideration and/or clarification IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary